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ISLAM AND THE CONSTITUTIONAL PROBLEM OF PAKISTAN

Pakistan has had two Constitutions so far, the first enacted in 1956 and abrogated in 1958 and the second promulgated in 1962 and again abrogated in March, 1969. The first Constitution, adopted by the Constituent Assembly of Pakistan in 1956, took nearly nine years of democratic process to obtain the necessary majority agreement. Besides political intrigues that inordinately lengthened the proccess, there were genuine difficulties created by the problem of proper relationship between East and West Pakistan (separated by an inimical India) and by the endless debate about the "Islamicity" of the Constitution. In the following we offer some reflections on the latter question drawing attention to salient points; this may be of particular interest in view of the fact that a third Constitution is proposed to be made after the elections scheduled for 5 October, 1970 (now postponed till 7 December).

As is well-known, Pakistan came into existence on the plea that the Muslims wanted to implement Islam in the new state and live according to its directives. Hence Pakistanis claim Pakistan to be an "ideological state". This must mean, and undoubtedly it is the intention of an average Pakistani Muslim, that the total policy and action of Pakistan is to be governed by the goals and values laid down by Islam. This in turn necessarily implies that Pakistan has these principles, policies and program goals fully worked out on Islamic grounds which

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it will seek to implement and embody in a Constitution (1). Just as various Communist parties, for example, have their goals, policies worked out in Communist terms—since the Communist ideology too is total and not partial—so have Pakistani Muslims worked out Islam. There may, of course, be subsequent adjustments and changes in the actual programmes and even in intermediate policies dictated by actual experience but at any rate the initial blue-print is all there—just as is the case with Communist ideology. This, finally, means that it is these pre-worked out goals, values and policies that shall be embodied in the Constitution which, by definition, cannot and, therefore, will not contain anything else besides these values, goals and policies, etc. If this were the case, it would hardly be necessary or logical to find phrases like "in accordance with Islam" or "in conformity with Islam", etc. in the body of the Constitution—since the entire Constitution *ex hypothesi* expresses nothing but Islam!

When, however, we turn to the two Constitutions actually enacted (and abrogated) we are surprised to find that none of the things mentioned in the preceding paragraph is true; on the contrary, it is startling to find (a) that Islam appears in these Constitutions as *an item among* a host of other matters of goals and policy and (b) that where Islam does appear it appears essentially *as a limitation*, as a "bounding" or limiting concept rather than as a positive or creative factor whence positive results are derived as values, goals or programmes for human progress and enrichment.

(1) That is to say that Islamic imperatives are already *known* well enough and are *only* to be implemented. The envisaging of the "Islamic Institutions," spoken of later in this paper, suggests, however, that *Islam* is not known. The statements about the"Islamization of Law", particularly in the 1956 Constitution (Clause 198,3), also strongly suggests that "Islamization" means bringing the existing law into conformity with *something that existed in the past.* .In view of the fact that Islam is not yet "there" in Pakistan, some representatives of minority Muslim groups have suggested that Pakistan be designated only as a "Muslim (not Islamic) Republic" for the time being just as Communist States call themselves "Socialist (not Communist) States." .The fundamental difference between the two, however, is that whereas Communism is future-oriented, Islam (as envisioned in Pakistan) is essentially past-oriented.

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Already the opening clause of the *Preamble* of the two Constitutions gives a foretaste of this attitude: "Whereas sovereignty over the entire Universe belongs to Allah Almighty alone, and the authority *to be exercised* (*exercisable* in the second Constitution) by the people of Pakistan *within the limits prescribed by Him* is a sacred trust." In order to appreciate the full significance of this clause, it is absolutely essential to have its background in view. Long before the enactment of the first Constitution in 1956 (whence the so-called "Islamic Provisions" were lifted and reinstated in Ayyūb Khan's Constitution as the latter was amended in 1964), Abū'l-A'lā Mawdūdī, leader of the *Jamā'at-i-Islami*, had been contending that Islam is essentially a limitation on human freedom. (1) This has reference not merely to the actual human conduct—where Mawdūdī equates "freedom" with "license"—but is seen also—and, indeed, primarily—as affecting human freedom *to legislate*. Whereas all other societies—so the argument runs—can and do legislate as they please and will, Muslim society does not enjoy such an unlimited freedom in legislation. It is, of course, difficult to see what this means inasmuch as *all* societies do, in fact, endeavor to legislate good; Mawdūdī, however, proceeded to draw from this preposition the comic conclusion that sovereign in Islam i. e. possessing the real power of legislation, is God, not man. It is obvious enough that here the idea of political sovereignty has been illegitimately transferred to God. The crass contradiction that this stand is involved in by its implication that in the non-Muslim societies God's sovereignty is not recognized i. e. that He is not sovereign in those societies—and yet He is sovereign over "the entire universe"—disturbed him little. The Muslim society, then, exercises *delegated* sovereignty as a sacred trust. (It would be too much to ask as to what this instrument of delegation is and how and where it was enacted.)

The truth, however, is that the sovereignty clause, as it was

(1) This abounds in Mawdūdī's writings; see, for example, his essays: *Towards Understanding Islam* (particularly last paragraph) and *Purdah*. This idea that Islam is fundamentally a check on human freedom is neo-Islam!, a *riposte* to Modern Islam which regards Islam as a liberating force for man intellectually and morally.

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actually adopted in these Constitutions, represents a compromise between the 'Ulamā (led in this respect by Mawdūdī) on the one hand and the Modernists on the other. For the 'Ulamā wanted this clause to mean explicitly that the Sharī'a as expressive of God's Will be sovereign. This would have meant subjugation of the present legislature to the entire gamut of historic Islam's experience. The Modernists, therefore, found it expedient to accept the sovereignty of God in general terms, even though the concept of the sovereignty of God had no meaning at all in the political context and, in fact, leads to ludicrous consequences as we have pointed out elsewhere. (1) While, therefore, making a compromise under pressure from the rightists, the Modernist in reality succumbed to the conceptual framework of the rightists inasmuch as he accepted "God's Sovereignty" rather than asserting, as he should have done in honesty, that sovereignty belongs to the people of Pakistan, who, being consciously Muslims, willed that Islam be implemented in Pakistani society both at the individual and the collective levels. It is noteworthy that in Ayyūb Khan's original Constitution (1962) the words "Within the limits prescribed by Him" did not appear and were only restored to it through the the First Amendment (1964) which sought to "Islamize" the Constitution fully!

In the 1956 Constitution, the clause just discussed about the sovereignty of God is immediately followed by the statement: "Whereas the Founder of Pakistan, Qaid-i-Azam Mahomed (i. e. Mohammed) Ali Jinnah, declared that Pakistan would be a democratic State based on Islamic principles of social justice." It is not at all clear how the sovereignty of God is immediately expressed by the authority of the Qaid-i-Azam. This hiatus was, therefore, sought to be remedied by Ayyūb Khan's Constitution by inserting after "Muhammad Ali Jinnah" the words "expressing the will of the people." Even so, the passage between the Sovereign God and the declaration of the

(1) This point has been discussed by the present writer in his article: Implementation of the Islamic Concept of State in the Pakistani context in *Islamic Studies*, Islamabad, VI, 3 (Sept. 1967), pp. 205-224.

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will of the people to govern themselves democratically is simply excogitated. If God, while delegating power to the people, has somewhere laid down principles of democracy and "Islamic social justice", this needed to be pointed out instead of a bland statement whose Islamicity many readers would suspect. Further, does God lay down "*Islamic* social justice" or "social Justice"? Has God revealed the Qur'ān or an "*Islamic* Qur'ān"? For, when God has laid down something and if something is a Divine Ordinance, what is the function of the adjunct "Islamic"? These questions are important since they help reveal a mental attitude we shall have occasion in this paper to point to. For the present, it is sufficient to say that the suspicion is strengthened that the addition of the term "Islamic" is designed to limit or curtail "Social Justice" and "democracy" and this curtailment is in the interest of Islamic history rather than being a reference to Islam—for Islam presumably ordained social justice, not *Islamic* social justice.

This is followed by a series of statements to the effect that 1) the principles of democracy, freedom, equality, tolerance and social justice, *as enunciated by Islam*, should be fully observed; 2) the Muslims of Pakistan should be enabled individually and collectively, to order their lives in accordance with the teachings and requirements of Islam as "set out in the Holy Qur'an and Sunnah"; 3) the state should exercise its powers and authority through representatives chosen by the people; 4) the legitimate interests of minorities (including their religious and cultural interests) should be safeguarded; 5) all fundamental human rights should be guaranteed.

One cannot fail to observe that in this series there are two statements about Islam while the other three are juxtaposed beside these "Islamic" statements. These are apparently neutral to Islam and Islam neutral to them i. e. that a representative form of government, safeguarding minorities' rights and guaranteeing human rights are matters somehow outside Islam. For if this were not the case, why is it that whereas freedom, equality and social justice, etc., are always to be observed as "enunciated by Islam," no reference to Islam is made in the

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case of human rights, minorities' rights, etc. If the claim that "Islam is a complete way of life" has any authentic meaning, can these important, indeed fundamental, aspects of public life be unrelated to Islamic values? (1) Yet this failure is visible not just here but throughout the Constitutions—where, that is to say, *positive values* are involved as distinguished from the purely technical side of statecraft. For example, clauses about social uplift, education and, indeed, the relationship between East Pakistan and West Pakistan (the most crucial and delicate issue of justice in the entire political life of Pakistan) are recited without any mention of Islam. The question then is: What difficulty or difficulties have led to the situation where Islam has been very explicitly mentioned—sometimes even through sheer conceptual confusion as in the case of sovereignty of God—while in the rest of both the Constitutions it has been thought fit to proceed without mentioning Islam (except the promise of taking measures for the Islamization of law and life over a period of time, which is, of course, a different matter)?

The reason for this state of affairs with the Constitution of Pakistan has been that whereas the creation of the State of Pakistan had been on the basis of Islam, from the very beginning there has been an acute struggle between the rightists i.e. the Jamā'at-i-Islami and the 'Ulamā and the modernist intellectuals over the meaning of an Islamic State. When the righitsts contended for the insertion of the Sovereignty of God, they meant that the Sharī'a ought to be implemented in Pakistan. And what they meant by "the Sharī'a" was that body of law and doctrine which had been worked out in history by Muslim lawyers and theologians by their deductions and derivations from the Qur'ān and the Sunna of the Prophet. Hence the rightitsts were actually arguing for a revival and resuscitation of the past. The Modernist, on the other hand, wished to

(1) For a general criticism of the Modernists' methods of understanding and interpreting Islam, see my forthcoming article "Islamic Modernism: its Scope, Methods and Alternatives" in the *International Journal of Middle Eastern Studies*, Cambridge (England), I, 3 (Oct. 1970).

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avoid at any rate, a total reimposition of the past since he knew that much of that past was inapplicable in today's society.

Strictly speaking, the 'Ulamā's contention (as distinguished from the Jamā'at-i-Islami) for reimposing the past really boiled down in particular to a few specific institutions. On the positive side were the five or, at practical level, four "pillars"—public prayers, fasting, Zakāt-tax and pilgrimage. On the negative side were certain legal bans and restrictions along with the traditional legal sanctions—theft, adultery, interest (usury) and alcohol. When we add to these the personal laws, including the laws of inheritance which have remained, until recently anyway, intact through the ages and there was, therefore, no question of "resuscitating" them, the demands of the 'Ulamā are complete. Thus, what remains if implementable Islam according to the rightists are more or less the four pillars (do's) and the four laws (don'ts). Indeed, the 'Ulamā, for centuries, have practically accepted an Islam that was essentially secularized. The doctrine of the "five pillars" of Islam was formulated at a very early stage—probably the second or third generation after the Prophet. The putative function of the five obligatory duties, no doubt, was to serve as anchoring points for the life of the community. (The Khārijites had included Jihād as the sixth pillar). But the isolation of the five duties from the indivisible total teaching of the Qur'ān and their being marked out for a special emphasis had the inevitable effect of defining "essential Islam" as being coextensive with them. The division of the law into "duties of man pertaining to God *('Ibādāt)*" and "duties pertaining to human beings (mu'āmalāt)" served to confer formal recognition of this position (it is to be noted that, in this division, the Zakāt tax is included among duties owed to God—even if the Qur'ān definitely and repeatedly speaks of Zakāt as a *social* duty). Finally, the adoption of the theological principle (couched in the form of a famous fundamental Ḥadīth) that a Muslim remains a *Mu'min* "even though he may commit adultery or theft" cut the ground beneath all morality and positive goodness as demands of Islam. As a results, the positive currents of Islamic life flowed into the Sufi fold and Sufism arose as a direct challenge

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to this "formal" or "official" Islam. The body of positive law that had been evolved through much labour remained stationary after the fourth century of the Hijra and, therefore, partly fell into disuse and partly was supplanted by king-made legislation in the medieval ages. The 'Ulamā had, therefore, nothing left with them (besides personal law) except the four obligatory duties—which we may term "minimal Islam"—and the four penal measures—which we may designate as "negative Islam." The 'Ulamā were quite happy with this situation and apparently did not think that anything important had gone wrong by the falling into disuse of the edifice of the Sharī'a.

Into this picture of partly "minimal" and partly "negative" Islam was born and grew Islamic modernism in the nineteenth and twentieth centuries as a response to Western influences and Western criticism of the Islamic society. Since this challenge was against certain aspects of the Muslim *society*, a number of Muslims took up the challenge on those specific issues to demonstrate the rationality and modernity of precisely those aspects. In doing so the Modernist Muslim in most cases reinterpreted the teaching of the Qur'ān and the Sunna—*against* the historic interpretation and practice, at the same time seeking to prove the "superiority" of the Islamic teaching to the Westerners'. This Modernist activity reawakened the Muslim consciousness of a "total" or "integral" Islam—the idea that Islam embraced not only certain rituals and laws but the totality of life, including all spiritual, political and social aspects. The 'Ulamā, for whom, besides minimal and negative Islam, Islam was largely a matter of personal purity and piety showed, on the whole, little enthusiasm for the modernist's "integral" Islam until the activist movements of neo-Islam arose around the third decade of the present century. These movements took the concept of an "all-embracing" Islam or "Islam as a system" from the Modernist and, essentially reactionary as they were, gave it a revivalist or a negative content. To this onslaught of aggressive revivalism—which the Modernist himself had helped generate unwittingly—modernizing trends fell a victim.

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Thus, when the Constitution of Pakistan talks about the Sovereignty of God, it commits sheer confusion under the impact of the revivalists and the rightists in general who had little idea of the modern concept of political sovereignty. When it enunciates the principles of "Islamic social justice" and "freedom, equality and tolerance in accordance with the teaching of Islam," such statements are Janus-faced. To the Modernist they mean values that are valid in the progressive liberal modern societies and which, in his view, Islam stood for in its pure and pristine teaching; to the revivalist, secondly, they mean values as acted upon in the early *history* of Islam (implying the Muslim community's special status as distinguished from non-Muslims.) It should be noted that Mawdūdī explicitly affirmed his conviction in the status of non-Muslims as *Dhimmis*. To the traditional 'Ulamā, thirdly, clauses about social justice, etc. do not mean much although they may concede them as flowing from Islam and they would concede them in the revivalist's sense. But the two constitutions are significant in what they do *not* include. Neither the Modernist nor the revivalist was keen to include the doctrine of "five pillars" except Zakāt-tax which was included as a *social* objective. Such other recommendations of the rightists (i. e. the revivalists and the 'Ulamā) as forbidding the public role of women and their being enlisted in the service of Pakistan were rejected and the Constitution declared unequivocally that sex shall not be a disability in the conferment of any fundamental right. It was not, however, shown to be a *Modernist Islamic* position and the rightists are against it.

There is still a fourth force whom we have not mentioned so far. This force, having its strong representatives primarily in the Civil Service and some Leftist politicians, is that of secularization. This group, although not openly vocal, nevertheless, exerts strong behind-the scene pressure. The target of its pressure is naturally the Modernist who, in its view, is already half way to secularism! Curiously but understandably enough, however, the secularist, in his practical attitude, comes closest to the position of the 'Ulamā. "Curiously", we say, because we would expect the secularist

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to be diametrically opposed to the 'Ulamā. "Understandably," however, if we recall what we said earlier on concerning the "minimal" and the "negative" Islam of the 'Ulamā who have traditionally yielded the largest ground to state-secularism. The secularist is quite happy to accept the "minimal" Islam—i. e. the "five pillars" of the 'Ulamā since they allegedly represent an individual's private duties to God (for Zakāt, which was in reality a public tax, has become, over the centuries, mere private charity). As for the 'Ulamā's "negative" Islam (i. e. the four crimes and their traditional punishments), the secularist feels confident that these would never be resurrected once they have lapsed and he also relies on the good offices of the Modernist, should the 'Ulamā agitate for the restoration of these laws, just as the Modernist is bearing the brunt of the rightists' combined attack on the Family Law Reform. But for these two areas of possible conflict, the secularist and the 'Ulamā can enjoy good mutual understanding. (1) They

(1) It is the secularist that constitutes the more dangerous of the two threats—the other being the rightist—to the potential Modernist. This is because of the fact that, whereas the rightist's stand is more or less clear, the secularist, because of his vagueness, exerts a more subtle corrosive influence on the Modernist's position. So far as actual, concrete, attitudes are concerned, it is often difficult to draw a line between secularists and Modernists-indeed, the same person can now behave as the one, now as the other.

Of all the people in positions of power or influence in Pakistan, I never experienced a more clear-headed person, from this point of view, than President Mohammed Ayyūb Khan. If the statements of his party or his government show inconsistencies, it is because of his advisors and colleagues who often did not understand issues clearly at all and exhibited an extraordinary conceptual confusion about Islam, or at times, were led by purely *ad hoc* and opportunistic considerations, even if there was no failure of understanding. Ayyūb Khan understood full well that Islam is not a partial affair but is concerned with and relevant to all values; but his best sense was often overruled by the conceptual (and moral) bungling of many of his associates and colleagues.

An interesting illustration of this question can be studied in, for example, *Pakistan's Search for Constitutional Consensus* by K. P. Misra et al., New Delhi, 1967, Chapter 7 which depicts the 1964 Election Propaganda battle between the government and the opposition parties. Islam is *one* of the battlecries; the rest— from education, through economic justice, to democracy appear as irrelevant to Islam to the government as to the opposition. For the opposition, the specifically *Islamic* issue, of course, was the *Muslim Family Laws Ordinance* and perhaps Pakistan's relations with Muslim countries.

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can come to a headlong clash only if Pakistani secularists adopt the line of Turkish secularism which not only separates the State from religion but where the "secular" state actually administers religion and, among other things, takes over the religious education from the 'Ulamā's hand; this, however, is nowhere visible on Pakistan's horizon, either in the secularist or in the Modernist's program.

We are now able to understand the constitutional dilemma of the Modernist. Under pressure from the revivalist on the one side, the secularist on the other, continuously harassed by the 'Ulamā (who, mainly because of the faintheartedness of the Modernist, do wield considerable influence on the masses) and, above all, by his lack of a strong faith in his own Modernism, he cannot find a firm *locus standi*. Even thus emerges the constitution as a truly Islamic fetish: a mere ad hoc and mechanical application of the term "Islamic" to certain concepts to the exclusion of others. "Islamic justice and tolerance"... Why are not human rights Islamic? What about education and health? And above all, is not the eradication of poverty—the removal of poverty being the *sine qua non* of "enabling the Muslims of Pakistan individually and collectively to order their lives in accordance with the principles and concepts of Islam"—a fundamental Islamic duty?

This is why it has to be conclued that the Constitutions of Pakistan fail of their ideological target and that is why we have called them an Islamic fetish. The proper method for an Islamic Constitution would be to state all policies of the state severally in a prolegomenon and to link them all with the Qur'ān and the Sunna. *All* policy matters will have to be thus specifically and explicitly dealt with—including development, defense, international policy, education, etc. Having dealt with these principles and goals of policy in detail and systematically, then in the substantive part of the Constitution positive policy-directives may be enunciated. The claims of an ideology require this and will not be satisfied with anything less than this. This would mean a bold stand on the part of those who characterize themselves as Modernists and a genuine and unflinching faith in the modernist postulates.

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Of the two Constitutions, it must be said in fairness that the 1956 Constitution is far less consistent with its Islamic vocation than the 1962 (1964) Constitution. Having declared that the Muslims of Pakistan shall be enabled to lead their lives individually and collectively in accordance with Islam, it proposes to do nothing concrete about it. In part XII, Chapter 1, two "Islamic Institutions" were envisaged—a research institute and a law commission. Neither of these is charged with making actual recommendations for the Islamization of life, for the task of the research institution is to carry out research while the purpose of the law commission is to make recommendations concerning law only. The 1962 (1964) constitution, on the other hand, not only charged the Advisory Council of Islamic Ideology with the Islamization of law but also called upon it to make recommendations for the Islamization of life and also to examine and evaluate legislation in progress from the Islamic point of view (something which the 1956 Constitution completely neglected).

It is characteristic of confusionism in Pakistan constitution-making that whereas, on the one hand, Islamic authority is deliberately limited to the Qur'ān and the Sunna of the Prophet—a fact which is supposed to give free-play to fresh *Ijtihād* and *Ijmā'*—, on the other hand, it is laid down that "in the application of this principle (i. e. of legislation according to the Qur'ān and the Sunna) to the personal law of any Muslim sect, the expression "Qur'ān and Sunna" shall mean the Qur'ān and Sunna as interpreted by that sect." This phrase was reinserted from the 1956 Constitution into the 1962 Constitution by the Constitution First Amendment Act of 1963 (enforced in 1964) without regard to the limitation of the Islamic authority to the Qur'ān and Sunna only. Thus, all existing Fiqh-schools were perpetuated. And this, notwithstanding even the important statement in the *Principles of Policy* that "unity and observance of Islamic moral standards should be promoted among the Muslims of Pakistan." How is this to be achieved while granting perpetual recognition to Fiqh-schools with their varying legal systems affecting doubtlessly moral standards? It is true, however, that despite the recognition of Fiqh-schools,

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so far as personal law is concerned, the Muslim Family Laws Ordinance—a great stroke of reformist legislation—was enforced in 1961.

It remains to be seen what type of constitution is brought forth by the new Constituent Assembly that is to be convened as a result of the forthcoming December elections and which is charged with the framing of an acceptable constitution within four months of its establishment. It should be noted, however, that the secular political parties—the Awami League of East Pakistan and the National Awami parties of East and West Pakistan—have gained considerable strength since the fall of the regime of Mohammed Ayyūb Khan in March 1969. This is due to the failure of the so-called Islamic groups to meet the popular demands for economic distributive justice aggressively put forward by the Leftist parties as "Islamic socialism". This clearly shows that an Islam that does not solve human problems has, at best, a precarious future, indeed!

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